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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LOAN THIHONG NGUYEN, Defendant and Appellant.	H044510 (Santa Clara County Super. Ct. No. C1507174)

I. INTRODUCTION

Defendant Loan Thihong Nguyen appeals after a jury found her guilty of six counts of first degree burglary and found true the allegations that a person other than an accomplice was present (Pen. Code, §§ 459, 460, subd. (a), 667.5, subd. (c)(21); counts 1-6);[1] two counts of attempting to dissuade a victim or witness from reporting a crime (§ 136.1, subd. (b); counts 7 & 8); seven counts of grand theft (§§ 484-487, subd. (a); counts 9-15); and six counts of passing an altered or fictious check (§ 476; counts 16-21). The trial court found that defendant had a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) and a prior serious felony conviction (§ 667, subd. (a)), and sentenced defendant to 45 years 8 months.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Defendant challenges the sufficiency of the evidence in support of the jury's finding that a person other than an accomplice was present during the commission of the burglary charged in count 4; her convictions on counts 17 and 18 for passing an altered or fictious check; and her convictions on counts 7 and 8 for attempting to dissuade a victim or witness from reporting a crime. Defendant also contends that the trial court erred when it admitted expert testimony on Rohypnol; the trial court's award of direct victim restitution was improper; the case must be remanded to permit the trial court to exercise its newly enacted discretion to strike defendant's prior serious felony conviction; and the trial court erred when it imposed various fines and fees without determining whether defendant had the financial ability to pay them.

We conclude that there is insufficient evidence to support the jury's finding that a person other than an accomplice was present during the commission of the burglary charged in count 4 and to support defendant's convictions on counts 17 and 18 for passing an altered or fictious check. We will therefore reverse the judgment; direct the trial court to vacate the jury's section 667.5, subdivision (c)(21) finding on count 4 and the convictions on counts 17 and 18; and remand the matter for resentencing. Defendant may raise her claims regarding the direct victim restitution and the imposition of fines and fees on remand. Moreover, on remand the trial court shall exercise its discretion regarding whether to strike defendant's prior serious felony conviction.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Charged Offenses*

1. June 2012: Jacqueline Yamauchi (Count 15)

Nancy Ho worked at Bay 101 Casino in San Jose and met defendant there in June 2012. Defendant told Nancy[2] that she needed help because she had come from

[2] We refer to Nancy Ho by her first name for clarity because there is a victim of the charged offenses with the same last name.

out of state and had lost everything but her checks. Defendant needed someone with a checking account to deposit the checks so that she could bring her children here.

Nancy introduced defendant to Jacqueline Yamauchi. Nancy and Yamauchi were old friends. Nancy had told Yamauchi about defendant's situation, and Yamauchi felt sorry for her because Yamauchi was also a single mother. Yamauchi decided to help and told Nancy to have defendant come to her house.

Several days later, defendant was dropped off at Yamauchi's house in San Jose. Defendant told Yamauchi that she had two very young children whom she "need[ed] to bring . . . right over because they need to go to school." Defendant said that she had a few checks, but she could not open a bank account because she had lost all of her paperwork. Defendant stated that the checks could be deposited and then "cashed out" a few days later, which would give her the money necessary to rent a house.

Yamauchi and defendant went to Chase Bank on June 22, 2012, where Yamauchi deposited two checks, one for $4,900 and the other for $4,800. Defendant returned to Yamauchi's house two or three days later and asked Yamauchi to take her to the bank to get the cash. Defendant wanted Yamauchi to withdraw $8,000 or $9,000, but the bank would not let her withdraw that much. Yamauchi withdrew $5,000 and gave it to defendant.

Yamauchi and defendant also went to U.S. Bank because Yamauchi had an account there, too. Defendant had Yamauchi deposit two checks, also in the amounts of $4,900 and $4,800. Defendant asked if the checks could be cashed right away, but the bank did not allow it. Yamauchi withdrew $200 and gave it to defendant because defendant said she was hungry and had not eaten for a few days. Yamauchi also withdrew $600 from an ATM and gave it to defendant.

All of the checks defendant gave to Yamauchi to deposit bounced. Chase Bank took all of the money out of Yamauchi's account to pay for the $5,000 withdrawal. Yamauchi had given defendant a total of $5,800.

2. August 2012: Jennilyn Hoang (Counts 6 & 14)

In August 2012, Jennilyn Hoang's father decided to rent out a room in their house in San Jose and placed an ad in a local Vietnamese magazine, Thang Mo Magazine. Hoang met defendant at the house after defendant called Hoang's father about the room. Hoang was 21 years old. Hoang showed defendant the room, and defendant indicated that she wanted to rent it for her brother who was moving to San Jose from Texas. The rent was $450 a month plus a $450 security deposit.

Defendant told Hoang that she had a check from her brother to pay for the rent. Defendant asked Hoang to deposit the check, keep $900, and give the remaining amount to her in cash. Defendant explained that she did not have a bank account because she had gone through bankruptcy proceedings while living in Texas. Hoang felt sympathy for defendant because she said she had gone through a really hard time and wanted to start a new life in San Jose.

Defendant and Hoang went to the bank where Hoang saw that the check was for $4,600. Hoang deposited the check and got $3,700 in cash, which she gave to defendant. Hoang thought that if the check had been bad, the bank would not have cashed it.

One or two days later, defendant called Hoang and said that something was going on with her brother in Texas so she needed the $900 back. Defendant told Hoang that her brother would pay the rent and the security deposit once he got to California. Hoang agreed to give defendant the $900. Defendant arrived at Hoang's house a couple of hours later and they went to the bank. Defendant asked Hoang to cash another check for her, saying that she needed the money to support her son. The check was from a friend. Hoang felt sorry for defendant and wanted to help. Hoang cashed the check for her.

Defendant continued to ask Hoang to cash checks for her, all of which were written by other people. Hoang never saw the checks before defendant handed them to the teller. Over a five- or six-day period, Hoang cashed 22 checks at three different

banks for defendant for a total sum of $69,100. All of the checks bounced. The banks accused Hoang of taking the money and she has to repay the banks $69,100 plus interest.

3. December 2012-January 2013: Canh Ho (Counts 5 & 13)

In 2012, Canh Ho decided to rent out a room in his San Jose trailer home to generate some additional income. Ho was approximately 63 years old and lived in the trailer with his wheelchair-bound wife. In mid-December, Ho placed an ad in Thang Mo Magazine. Ho wanted to rent the room for $450 per month.

In January 2013, defendant called Ho asking to see the room. Defendant told Ho her name was Cindy. Ho met with defendant at the trailer the next day. After looking at the room, defendant agreed to rent it for $450 a month and to pay a $450 security deposit. Defendant said she was a Buddhist and offered to help Ho with his wife and to take them to temple.

After coming to an agreement, defendant told Ho "her life story." Defendant said she was from out of state and had owned a business, but she moved to California after she divorced and lost everything. Defendant said that she was temporarily residing in a Buddhist temple. Ho was Buddhist and had Buddhist artifacts around his home. Defendant's story made Ho feel sorry for her.

Defendant told Ho that she would write two checks, one for $4,800 and the other for $4,900. When Ho told defendant that he did not want that much money for the room, defendant said that she was paying her "future rent." Defendant wrote and signed the checks for $4,800 and $4,900 and asked Ho to accompany her to the bank to deposit the checks into his account.

The printed name on the checks was "Thu Le." Defendant explained that her sister had given her the checks to use. Defendant said that she had asked her sister to keep her money for her because she was unable to open a bank account on her own.

Ho deposited the checks into his account, and defendant told the teller to give her $2,000 back from Ho's deposit. Ho did not understand why the teller was willing to do

it, but he thought it might have been because he had been a customer in good standing for 20 years and had never bounced a check. He also thought that the teller gave defendant the money because the checks were good. Defendant took the $2,000. Defendant said that she needed the money to purchase furniture before she moved in.

Two or three days later, on January 30, 2013, defendant asked Ho if her boyfriend could move in with her. When Ho refused, defendant asked Ho for her money back. Ho drove them to his bank and withdrew $7,500. Defendant took all of the money.

As soon as Ho realized what defendant had done, he called the bank and reported her to the police. Ho lost a total of $9,500 and had a negative account balance of almost $9,000. The bank garnished his wages until Ho filed for bankruptcy in 2014.

4. November 2014: Thinh Bui (Counts 4 & 12)

Thinh Bui lived with his wife in a house in San Jose. At the end of October 2014, Bui's wife told him that defendant needed a place to stay. Bui had lost his job in 2008, so they decided to rent out the guest room to defendant to help with the bills. Defendant and Bui agreed that defendant would start paying room and board in the amount of $1,500 on November 1, but she could move in a couple of days before that. Defendant said that she was Buddhist, which made Bui, who was also Buddhist, believe he could trust her.

Defendant moved into Bui's house and lived there for approximately three weeks. Shortly after moving in, defendant asked Bui to drive her to work at Artichoke Joe's, a card club in San Bruno. Defendant continued to ask Bui to drive her to local card clubs almost every day. Defendant said she was a "prop player." They agreed that defendant would pay Bui $400 a week for gas and his services. Defendant never paid Bui room and board, but she paid him $400 for the first week of driving her. While defendant lived at Bui's house, Bui lent her approximately $1,200 to send to sick people defendant knew in Vietnam.

Around the second week defendant was living in Bui's house, Bui mentioned that he might be interested in selling his $4,000 Cartier watch and his mother-in-law's

diamond ring. Defendant said that she knew people at the casino who would be interested in buying the items. Bui showed the watch and ring to defendant. When defendant said she could find a buyer, Bui indicated that he still had not made a firm decision to sell the jewelry.

A couple of weeks later, Bui noticed that the watch and ring were missing. Bui had gone to check on them because one day defendant told Bui that she did not need him to drive her to work because she was getting a ride from a friend. Bui went out to run errands, leaving defendant alone in the house for three to four hours. When Bui returned home, defendant had already left for work. Bui got a bad feeling and went to look for the jewelry. When Bui realized the items were missing, he called defendant. Defendant admitted that she took the items, but said that she had a potential buyer and needed to take them. Bui got angry and told defendant she needed to bring the watch and the ring back. Defendant said that the potential buyer had them because the items needed to be appraised. Defendant seemed apologetic, but she did not come home that night. They arranged a time for Bui to get the items back, but he could never find her. Bui called her hundreds of times, but defendant always gave him the runaround.

Between the loan, the unpaid rent, and the unpaid driving services, defendant owed Bui approximately $3,500. Bui asked defendant for the money and she said she would have someone give him a check. Defendant told Bui to meet the person in front of Bay 101 Casino around 6:00 p.m. A man showed up around 8:30 or 9:00 o'clock and gave Bui a check for $6,000. The man identified himself as David Ngo, which matched the name on the check. Bui tried to cash the check the next day, but the teller said that the account was frozen. Bui called defendant and she promised to "make good on the check," but that never happened.

5. February-March 2015: Tuan Pham (Counts 3 & 11)

In December 2014, Tuan Pham and his fiancée placed an ad in Thang Mo Magazine about a room to rent in their house. Defendant contacted them, and Pham's

fiancée showed her the room. Defendant agreed to rent the room for $500 a month and to pay a $250 security deposit. Defendant moved in on February 1, 2015. The day before, she gave Pham $750 in cash.

Shortly after she moved in, defendant asked Pham to deposit some checks for her and to give her cash back from the checks. Defendant said she did not have a bank account because her real estate business had gone bankrupt. Defendant explained that her younger brother was keeping her money for her.

Pham cashed four checks for defendant over the course of two days. The four checks were written for a total amount of $18,400, and defendant directed Pham to get $11,000 in cash back. Defendant asked Pham to cash two more checks, but Pham refused because he was starting to get suspicious.

A couple days after Pham deposited the checks, defendant asked Pham to look at his account balance. Pham checked and saw that the deposits from defendant's checks had been credited to his account. Pham thought this meant that the checks were good, so when defendant asked for the remainder of her money, Pham gave it to her. Defendant told Pham that he still had $7,900 of hers, which turned out to be $600 more than the checks were written for. Pham rounded the amount defendant requested up to $8,000 and gave it to her.

On February 6, 2015, Pham went to his bank and learned that his account had been closed because all four checks had bounced. A banker told Pham that he owed the bank $19,010. Pham confronted defendant, and defendant said that her brother was overseas and there were issues with his account because "there was a case of identity theft." Defendant told Pham that her brother was still in Vietnam and that he would take care of it when he returned in one to two weeks.

Around February 14, 2015, defendant gave Pham approximately $2,000 in cash. Several days later, after Pham threatened to go to the police, defendant gave him $5,000

in cash. During the rest of February, defendant continued to promise to pay the rest of the money back.

Around mid-March, Pham told defendant to move out. Defendant did not pay the rest of the money back or pay any rent for the month of March. Subtracting the $2,000 Pham had in his bank account, Pham owed the bank $10,000. His family helped him pay the bank.

In late March, Pham received a letter from defendant. Defendant wrote, "Police are still investigating me. You understand my meaning." The letter also said that "Dung X.O[.] will come by to take of [*sic*] the other miscellaneous things for me." X.O. had been at Pham's house with defendant on a couple of occasions and Pham was a little bit afraid of him because it was "rumored that he was a person that you just don't want to go near . . . ." Pham did not want X.O. coming around his house because he knew that X.O. was not a "decent person." Defendant also said in the letter that she would repay Pham, but Pham did not receive any more money from defendant.

Pham received another letter from defendant on April 4, 2015. Defendant wrote, "They are reading my mails, incoming or outgoing, because they are still investigating me. The best thing is not to write back." Pham understood that to mean that defendant was asking him not to go to the police about what happened and that she would pay him back when she got out of jail. She included X.O.'s phone number in the letter and wrote, "If you wanted to say something, say it to him." X.O. was not someone Pham wanted to say anything to. Defendant said she was the only one who could take care of the money. Pham never received any more money from defendant.

An investigator from the district attorney's office called Pham in June 2015. Pham told the investigator that he did not want to get involved because he was afraid that defendant would seek revenge. Pham was still fearful when he testified at trial in 2016.

6. December 2014-January 2015: Thong Ta (Counts 16-21)

On December 25, 2014, Thong Ta met defendant at a Vietnamese bar. Ta approached defendant and struck up a conversation with her. Defendant asked Ta for his phone number and called him the next day to ask him out to lunch. They went to lunch that same day and began regularly seeing each other. Ta fell in love with defendant and thought of her as his girlfriend.

About a week after they first met, defendant asked Ta to "pre-sign" a check for her. Defendant said the check was for a deposit on a white Lexus. Ta signed the check and left the rest of it blank. Defendant told Ta she would put him on the car's title because he had good credit. It was Ta's understanding that the check would be written in the amount of $5,000 and defendant would repay him by depositing cash into his account.

At some point in January 2015, defendant asked Ta to open several new bank accounts. Ta believed defendant was wealthy. Over the course of about a week, Ta opened four or five accounts in his name. Ta deposited approximately $200 to $300 in each of the new accounts. Defendant's name was not on the accounts because she said that her Texas driver's license had expired.

The banks gave Ta starter checks, which he gave to defendant because she was going to use the accounts as her own. At defendant's request, Ta signed the checks from one of the new accounts before giving them to her. All of the starter checks eventually bounced. Ta now has bad credit and is unable to open a bank account.

In 2002, Ta was convicted of felony grand theft for depositing a bad check written for over $10,000.

7. February 2015: Julie Dao (Counts 2 & 10)

In February 2015, Julie Dao decided to rent out the master bedroom in her San Jose home for $800. She placed an ad in Thang Mo Magazine and showed defendant the room on February 18. Defendant asked Dao how many people lived at the house. Dao told her that she was a single mom with three children. Defendant said that she was in

the same situation. She told Dao that her husband had left her and slept with her best friend, which made Dao pity her. Defendant said she would move into the room with her boyfriend. Defendant asked Dao to accept a check.

Later that day, defendant asked Dao if she could accompany her to Dao's bank. Dao took defendant to multiple branches of both of her banks, Chase Bank and Bank of America. Defendant gave Dao a check for $6,900 and told Dao that she could keep $2,000 of it if she got $4,900 in cash back for defendant. Dao got the cash and gave it to defendant.

Over the course of three days, Dao deposited a total of six checks for defendant. The checks were from either Thong Ta and Guang Ta. Each time, Dao got cash back and gave it all to defendant. Dao did not know why she cashed the checks for defendant, but she "did whatever [defendant] asked [her] to do" and "lost control." Dao did not feel like herself. Every time Dao got in defendant's car, defendant gave her chewing gum and water.

All of the checks defendant gave Dao to deposit bounced. Dao lost almost $27,000 in savings and, in addition, owed Chase Bank $23,448 and Bank of America $42,500.

When Dao told her fiancé, Harry Hien Vuc Pham (Hien), what happened, he took the keys to defendant's Lexus and threatened to keep the car unless defendant paid the money back. Ta was living at Dao's house with defendant, and Dao and Hien also confronted Ta about the bounced checks. They told Ta that he was responsible since the checks were written on his account and they made Ta sign a promissory note. Two of Ta's starter checks were written for $8,900.

Hien also searched defendant's room before she moved out of Dao's home to see if he could find any money. Defendant's bags were packed as if she was "ready to flee." Hien found a diamond appraisal certificate and a promissory note defendant had signed

for $30,000. In addition, Dao and Hien found one of Dao's checks in defendant's cell phone case, which defendant had written for $7,800 and signed in Dao's name.

On March 13, 2015, defendant paid Hien $5,000.

8. March 2015: Hai Dinh (Counts 1 & 9)

Defendant moved into Hai Dinh's house in San Jose in March 2015 after Dinh placed an ad in Thang Mo Magazine regarding a room for rent. Defendant agreed to pay a total of $900 for the first month's rent and the security deposit. Defendant told Dinh that she had bad credit and was unable to open a bank account because her husband had deserted her and her house had been foreclosed on. Defendant said that a sibling who was overseas had given her a check. Defendant asked Dinh to deposit the check and give her the cash for it so that she could pay the rent and cover some personal expenses. Dinh agreed and they went to Wells Fargo in defendant's car. Dinh deposited and cashed a check for $5,900, giving the money to defendant. That same day, Dinh cashed a second check from defendant written for $5,900 and gave defendant all the cash back from the check less $900, which Dinh kept.

Defendant's two checks bounced. When Dinh confronted her, defendant said that she would contact her sibling to have him put sufficient funds in the account. Defendant also offered to write Dinh another check, telling Dinh she could keep some of the deposit and give the rest to her. Dinh accepted defendant's offer, and defendant wrote a check for $5,800, which Dinh deposited into her bank account. Dinh could not remember whether she kept some of the money from that check.

Defendant gave Dinh two other checks for $5,800, but Dinh was unable to deposit and cash the checks for defendant because Dinh's bank told her she had insufficient funds. One evening, defendant begged Dinh to give her the money from the checks so that she could "pay for the release of the diamond from a jewelry store . . . ." Dinh got $12,000 in cash that she kept at her mother's house and gave it to defendant. It was

Dinh's understanding that giving defendant the $12,000 would free up the funds for the checks that had previously bounced.

Dinh later tried to contact defendant to tell her the checks had bounced, but defendant never called Dinh back. On April 4, 2015, defendant wrote Dinh a letter from jail stating that she would pay her once she was released. Defendant told Dinh not to write her back. The letter also said that mail coming into and out of the jail was "inspected very carefully."

Dinh had to pay Wells Fargo $11,800 to cover the amount of the bounced checks.

9. Other Evidence of Charged Conduct

"Dung X.O."[3] met defendant through a friend in late 2014. X.O. and defendant went to casinos together. Defendant bet large sums of money.

On March 31, 2015, defendant called X.O. from jail and asked him to pick up her phone from the jail. Defendant asked X.O. to get rid of the phone. She also asked him to move her belongings out of Pham's house. When X.O. told defendant he had moved her things, defendant said, " 'Now I can sleep better. I couldn't sleep the last two days.' " At defendant's request, X.O. also sent defendant the receipt Pham had given her for $5,000 and a diamond appraisal certificate. X.O. had never seen defendant with a diamond ring. Defendant asked X.O. to send her as much money as he could while she was in jail so that she could pay people back. Defendant also asked him to talk to Pham "[t]o get his story straight."

In July 2015, defendant indicated to X.O. that she was mad at Pham because he was pressing charges. She told X.O., " 'Anyone who messes with me, including Tuan and those sons of bitches, I'll settle the score later.' " She also said that she was " 'going to let [Bui] die.' "

[3] X.O.'s true name is Dzung Nguyen. In 2005, X.O. was convicted of obstructing commerce by interstate robbery and using a firearm in a crime of violence.

District Attorney Investigator Richard Fong located a white Lexus at a residence in San Jose in late March 2015. There were about three to four water bottles in the car. Some of the bottles were empty; others appeared partially full. There was no evidence that the water found in the car was tested. The car was registered to Thong Ta.

Based on his training on controlled substances including Rohypnol and his experience investigating drug crimes and sexual assaults as a former Santa Cruz County Sheriff's Deputy, District Attorney Investigator Todd Phillips testified that Rohypnol is a central nervous system depressant and was designed to be a sleeping pill. It causes drowsiness and short-term amnesia, and also lowers a person's inhibitions.

B. *Evidence of Uncharged Offenses*

1. September 2008: Trai Hoang

In July or August 2008, Trai Hoang sang at a concert defendant attended. Defendant introduced herself to Trai[4] when the concert was over, complementing Trai on his singing and asking for his phone number. Defendant said that she had moved to San Jose from Texas and she still had a brother there she had been in business with. She told Trai that she liked his music and wanted to promote him. She also said she was going to throw a big concert.

Trai later met defendant at a restaurant where they discussed how he could help with defendant's concert. Defendant said the concert would be held within one or two months. Trai was excited about it. In order to pay for the concert, defendant asked Trai to help her cash some checks her brother had left her before going overseas for business. Defendant explained that she could not cash the checks herself because she had filed for bankruptcy.

[4] We refer to Trai Hoang by his first name for clarity because there is a victim of the charged offenses with the same last name.

On September 19, 2008, defendant and Trai went to Trai's bank to cash a check. The check was written for $5,200. Trai told defendant he had less than $1,000 in his account, but defendant told him not to worry. Defendant said, " 'You withdraw my money. It's not your money.' " Trai deposited the check and got $2,500 in cash back. Defendant said she would get the remaining $2,700 later for the show.

Over the course of the next several days, Trai deposited three more checks for defendant and got approximately $13,000 to $14,000 back. After all of the checks from defendant bounced, Trai had to pay back the money.

2. January 2013: Pha Van Nguyen

In January 2013, Pha Van Nguyen owned a house in San Jose and rented out one of the rooms in the house. He decided to rent out another room, so he placed an ad in Thang Mo Magazine. At the end of January, defendant called asking to see the room. Defendant met Nguyen at the house and agreed to rent the room for $700 a month. Nguyen asked defendant to pay $1,500 up front, for the first and last months' rent and a $100 security deposit. Defendant agreed, but said that she did not have cash. She told Nguyen that her sister had given her a check for $4,900 that she could use. Defendant asked Nguyen to deposit the check into his account and told him that he could then keep $1,500 and give her $3,400 in cash back.

Nguyen and defendant went to Nguyen's bank, where defendant handed the check directly to the teller and the teller gave defendant $3,400. Five days later, Nguyen learned that the check had bounced. Nguyen never received any money from defendant and had to pay his bank $3,400.

3. February 2013: Ha Nguy

In February 2013, Ha Nguy decided to rent a room in her house and placed an ad in Thang Mo Magazine. Defendant responded to the ad and agreed to rent the room for approximately $400 to $500. Defendant told Nguy that she moved here from out of state after she suffered a business loss and that her younger brother was keeping her money

and had written a $4,900 check for her to use. Defendant asked Nguy to cash the check for her and said she needed the money to buy food. Nguy deposited the check into her account and cashed it. After keeping a security deposit for the room for about $500, Nguy gave the rest of the money to defendant. Nguy "thought it was her money [and] gave her the money." After that, defendant "just disappeared."

No defense evidence was presented and defendant did not testify.

C. *Charges, Verdicts, and Sentence*

Defendant was charged with six counts of first degree burglary (§§ 459, 460, subd. (a); counts 1-6); two counts of attempting to dissuade a victim or a witness from reporting a crime (§ 136.1, subd. (b)(1); counts 7 & 8); seven counts of grand theft of personal property worth over $950 (§§ 484-487, subd. (a); counts 9-15); and six counts of passing an altered or fictious check exceeding $950 (§ 476; counts 16-21). Regarding the burglaries, it was alleged that a person other than an accomplice was present during the commission of the offenses (§ 667.5, subd. (c)(21)). It was also alleged that defendant had a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) and a prior serious felony conviction (§ 667, subd. (a)).

A jury found defendant guilty as charged and found true the allegations that a person other than an accomplice was present during the commission of the burglaries. The trial court found the prior conviction allegations true and sentenced defendant to an aggregate term of 45 years 8 months.

III. DISCUSSION

A. *Sufficiency of the Evidence*

Defendant raises three claims challenging the sufficiency of the evidence. Defendant contends there is insufficient evidence to sustain: (1) the jury's finding that a person other than an accomplice was present in Thinh Bui's residence when defendant perpetrated the burglary (count 4); (2) two of her convictions of attempting to pass an

altered or fictitious check (counts 17 & 18); and (3) her convictions of attempting to dissuade a victim or witness from reporting a crime (counts 7 & 8).

1. Standard of Review

The standard of review for an appellate challenge to the sufficiency of the evidence to sustain a conviction or sentencing allegation is well established. "The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) "We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

"[E]vidence of each of the essential elements . . . [must be] *substantial*." (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) To be " 'substantial,' " evidence "must be 'of ponderable legal significance . . . reasonable in nature, credible, and of solid value.' [Citations.]" (*Id.* at p. 576.) While we review the record in the light most favorable to the judgment, " 'we must resolve the issue in the light of the *whole record* . . . and may not limit our appraisal to isolated bits of evidence.' " (*Id.* at p. 577.) " '[I]t is not enough for the respondent simply to point to "some" evidence supporting the finding, for "Not every surface conflict of evidence remains substantial in the light of other facts." ' [Citation.]" (*Ibid.*)

2. Enhancement on Burglary Charged in Count 4

Defendant first contends there is insufficient evidence to support the jury's finding pursuant to section 667.5, subdivision (c)(21) that a person other than an accomplice was

present in Thinh Bui's residence when defendant committed the burglary. Defendant asserts that this court is bound by the prosecution's election to argue that the burglary occurred when defendant entered a room within Bui's residence where a Cartier watch and a ring were kept, and that there is no evidence that a person other than an accomplice was home when defendant entered that room. The Attorney General counters that because defendant lived at Bui's house for four weeks and had " 'free reign' " of the residence, "jurors could have reasonably inferred that [defendant] stole Bui's jewelry" when Bui saw defendant upstairs in the residence or at another time when Bui was home. The Attorney General also argues that the jury "reasonably could have believed that Bui was mistaken about when the burglary occurred."

"Ordinarily, for purposes of substantial evidence review, 'the prosecutor's argument is not evidence and the theories suggested are not the exclusive theories that may be considered by the jury.' [Citation.]" (*People v. Brown* (2017) 11 Cal.App.5th 332, 341 (*Brown*).) There is "an exception, however, when the constitutional right to a unanimous jury is implicated. To protect this right, 'if one criminal act is charged, but the evidence tends to show the commission of more than one such act, "*either* the prosecution must elect the specific act relied upon to prove the charge to the jury, *or* the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." ' " (*Ibid.*) "The prosecution can make an election by 'tying each specific count to specific criminal acts elicited from the victims' testimony'—typically in opening statement and/or closing argument. [Citations.] Such an election removes the need for a unanimity instruction. [Citation.]" (*Ibid.*) "Under these principles, there is an implicit presumption that the jury will rely on the prosecution's election and, indeed, is bound by it." (*Ibid.*) Therefore, "when the prosecution has made an election, under circumstances where a unanimity instruction would otherwise have been required, then we, too, are bound by that election." (*Ibid.*)

Here, the prosecution elected to prove that the burglary charged in count 4 occurred when defendant "went into [Bui's] bedroom to steal the watch and ring," and the Attorney General does not contend that absent a unanimity instruction, an election was not required. We also conclude that an election was necessary because the evidence tended to show multiple acts in support of the charge, and we are therefore bound by the prosecutor's election. (See *Brown*, *supra*, 11 Cal.App.5th at p. 341.) The prosecution argued to the jury that after Bui showed his watch and his mother-in-law's ring to defendant, "at some point [defendant] went into th[e] master bedroom, because that's the last time anyone had seen [the items]," and took them. Thus, we must determine whether there is sufficient evidence to support the jury's determination that a nonaccomplice was present in Bui's residence when defendant entered Bui's bedroom to steal the watch and the ring. (See *ibid.*)

Section 667.5, subdivision (c)(21) provides that first degree burglary shall be a " 'violent felony' " when "it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary." The enhancement " 'does not require the use or threat of force. Indeed, [it] does not require any contact between the defendant and the occupant. The mere presence of a nonaccomplice in the dwelling is sufficient.' " (*People v. Munguia* (2016) 7 Cal.App.5th 103, 110.)

Bui testified that he kept the watch and the ring hidden in a drawer in the master bedroom. When he and defendant discussed selling the items, which occurred around the second week defendant lived at Bui's house, defendant asked to see them. Bui left the kitchen where the conversation was taking place and went to get the watch and the ring from the master bedroom. The master bedroom was upstairs with at least one other bedroom; the kitchen and the guest room where defendant was staying were downstairs. The day after Bui showed defendant the items, Bui drove defendant to work as usual.

Bui testified that a couple of weeks later, he noticed the watch and ring were missing when he returned home after leaving defendant alone in the house for three to four hours. Bui also stated that it was not uncommon for defendant to be in the house alone. Bui testified that defendant had free reign of the entire house, but there was no reason for defendant to go upstairs other than to visit a Buddhist shrine there. Bui had seen defendant praying at the shrine once.

Defendant was still sleeping at Bui's house "[u]p to th[e] day" Bui noticed the watch and the ring were missing. Once Bui called defendant to confront her, "after that day, she's gone." Defendant did not come home that night.

The Attorney General argues that jurors could have reasonably inferred from Bui's testimony that defendant stole the jewelry when Bui saw her upstairs praying at the Buddhist shrine "or [at] another time when Bui was in his home," based on Bui's testimony that defendant stayed at the residence for "at least another week" after Bui showed the items to her. However, the fact that Bui once saw defendant praying at the Buddhist shrine does not provide substantial evidence that the burglary occurred then, especially since it is unclear from the record if the time when Bui saw defendant praying at the shrine was before or after the burglary. Moreover, defendant had free reign of the residence and was often home alone. And while it is possible that the burglary occurred when someone was home based on the fact that defendant resided at the house with Bui and his family for some time after she saw the jewelry, defendant's stay at the residence is not evidence "of solid probative value" that a nonaccomplice was in the home when defendant entered the master bedroom to take the jewelry. (*People v. Conner* (1983) 34 Cal.3d 141, 149.)

Based on our careful review of the record, we can determine from Bui's testimony only that defendant entered the bedroom where the jewelry was kept sometime between when Bui showed her the items and when Bui confronted her with the fact that they were missing. "We may *speculate* about any number of scenarios that may have occurred on

the [day] in question. A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.' " (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on a different ground in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn 5.)

For these reasons, on this record, we conclude that there is not substantial evidence that a nonaccomplice was present in Bui's home when defendant committed the burglary charged in count 4. Accordingly, we will direct the trial court to vacate the jury's true finding on the section 667.5, subdivision (c)(21) enhancement on count 4.

3. Convictions on Counts 17 and 18 for Passing An Altered or Fictitious Check

Defendant next contends that there is insufficient evidence to support her convictions on counts 17 and 18 for passing an altered or fictious check in violation of section 476 because the checks at issue were "genuine checks on a real bank account that were signed by the account holder." The Attorney General agrees.

Section 476 states: "Every person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of any real or fictitious financial institution as defined in Section 186.9 is guilty of forgery." The essential elements of the offense are "[t]he uttering and publishing of a fictitious check with knowledge of its character and an intent to defraud . . . ." (*People v. Walker* (1911) 15 Cal.App. 400, 403.)

As the parties accurately observe, counts 17 and 18 were based on two starter checks drawn on Thong Ta's bank account that defendant gave to Dao. Ta testified that

the checks were genuine and that he signed them. Thus, the convictions must be reversed because passing genuine checks, even if uncollectible because of insufficient funds, does not violate section 476. (See *People v. Mathers* (2010) 183 Cal.App.4th 1464, 1468 ["because the checks were genuine rather than fictitious, their utterance or possession, although prohibited by other statutes, was not prohibited by section 476"].) Accordingly, we will direct the trial court to vacate the section 476 convictions on counts 17 and 18.

4. Convictions on Counts 7 and 8 for Attempting to Dissuade a Witness or Victim from Reporting a Crime

Defendant's final sufficiency of the evidence claim pertains to her convictions on counts 7 and 8 for attempting to prevent or dissuade Tuan Pham (count 7) and Hai Dinh (count 8) from reporting a crime in violation of section 136.1, subdivision (b)(1). Defendant contends that the convictions must be reversed because there was not substantial evidence that she "had the specific intent to dissuade Dinh or Pham . . . ."

As relevant here, section 136.1, subdivision (b) provides: "[E]very person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge. . . ."

Dissuading a witness is a specific intent crime. (*People v. Young* (2005) 34 Cal.4th 1149, 1210.) " 'Unless the defendant's acts or statements are intended to affect or influence a potential witness's or victim's testimony or acts, no crime has been committed under this section.' [Citation.]" (*People v. Pettie* (2017) 16 Cal.App.5th 23, 68-69 (*Pettie*).) Thus, the prosecution was required to prove that defendant intended to prevent or discourage Dinh and Pham from reporting a crime to law enforcement. (See *id*. at p. 69.)

However, " '[t]here is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. [Citation.]' " (*People v. Smith* (2005) 37 Cal.4th 733, 741.) When determining a sufficiency of the evidence claim, "[w]e 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]' [Citation.] 'Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]' [Citation.] Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358.)

Defendant's convictions were based on the letters she wrote Pham and Dinh from jail.[5] Defendant wrote Pham two letters. The first, dated March 30, 2015, stated: "Tuan, [¶] I was in court on 3/27/2015 and was placed into jail. I am sorry for not resolve anything for you! Police are still investigating me. You understand my meaning. When I am free, I will see you and everything will be better. [¶] Once again, my apology to you and your wife. Please put my bed in your garage for me. Dung X.O[.] will come by to take of the other miscellaneous things for me. [¶] I did not want everything to happen like this. But due to my unlucky month. Therefore one thing after another happened! [¶] I will never forget the things that you and your wife had done for me. I will see you when I am free and will repay you appropriately! [¶] Best regards. [¶] **/ signed: Loan Nguyen /**"

[5] Defendant wrote the letters in Vietnamese. The prosecution had them translated into English.

Defendant's second later to Pham was dated April 4, 2015, and stated: "Tuan [¶] I already wrote you a letter but didn't know whether you've received it. [¶] I did not want things to happen like that. They arrested me on my court appearance. I am really sorry to you and your wife. One day I will resolve everything for you! [¶] They are reading my mails, incoming or outgoing, because they are still investigating me. The best thing is not to write back. [¶] This is Dung[X.O.]'s (my little brother) phone number 408-[XXX-XXXX]. If you wanted to say something, say it to him. About the money, I am the only one can take care of it. Now I am in jail is like a snake with no head. You and your wife will have to wait for me. You won't lose it. [¶] Best Regards [¶] **/ signed: Loan Nguyen /**"

Defendant asserts that she was "convicted of writing an apology that suggested amends be made." There is substantial evidence in the record that defendant did more than apologize, however. In her first letter, she told Pham that she was still under investigation and that she would see and "repay [him] appropriately" once she was free. She also mentioned that X.O., a person Pham feared, would "come by." In the second letter, defendant told Pham not to write her back and that if he "wanted to say something," he should say it to X.O. Pham testified that X.O. was not someone he wanted to say anything to. Defendant also wrote that she was the only one who could "take care of [the money]." Pham testified that he understood defendant to be asking him not to go to the police about what happened and that she would pay him back when she got out of jail. Pham's interpretation of the letter was reasonable given that when Pham confronted defendant about the bounced checks in February 2015 and threatened to go to the police, defendant gave him $5,000. Moreover, when an investigator from the district attorney's office called Pham in June 2015, Pham told the investigator that he did not want to get involved because he was afraid that defendant would exact revenge. Pham was still fearful when he testified at trial in 2016.

X.O. testified that defendant called him from jail to get Pham's address. In July 2015, once defendant was aware that Pham had reported the crimes, she told X.O., " 'Anyone who messes with me, including Tuan and those sons of bitches, I'll settle the score later.' "

From this evidence, the jury could reasonably infer that defendant intended to dissuade Pham from reporting her to the police. " ' "There is . . . no talismanic requirement that a defendant must say 'Don't testify' or words tantamount thereto, in order to commit the charged offenses." ' " (*Pettie, supra*, 16 Cal.App.5th at p. 54.) "As long as his [or her] words or actions support the inference that he [or she] . . . attempted . . . to induce a person to withhold testimony [citation]" or forgo reporting a crime, the defendant is properly convicted. (*Ibid.*) It is the combination of defendant's actions and words that provides sufficient evidence that she intended to dissuade Pham from reporting her to the police.

Regarding the charge involving Dinh, the evidence showed that defendant had also gotten Dinh's address from X.O. when she called X.O. from jail. Defendant wrote Dinh on April 4, 2015, the same day she wrote her second letter to Pham. The letter to Dinh stated: "Hai: [¶] I have been incarcerated since 3/27/15. Because it is inconvenient for me to mail a letter to you. Because they are still investigating me. So all incoming and outgoing mail are being inspected very carefully. [¶] Do not respond to my mail. I apologize to you and your husband for everything. Please wait until my release so that I can resolve everything in a satisfactory manner. There are a lot of unfortunate things that have happened to me for this entire month. But it is not convenient for me to explain all of this to the two of you. [¶] Please do not be angry at me any more! I am praying that your husband will recover from his medical condition and that God would give you prosperity in your business, in good health and happiness. [¶] Affectionately to the two of you, [¶] L. Nguyen."

We conclude that the jury could also reasonably infer that defendant's letter to Dinh, telling Dinh that she was being investigated and asking Dinh to "wait until [her] release so that [she could] resolve everything in a satisfactory manner," was also written with the specific intent to dissuade Dinh from reporting defendant's crimes. The evidence showed no motive for the letter other than dissuasion. "If the defendant's actions or statements are ambiguous, but reasonably may be interpreted as intending to achieve the future consequence of dissuading the witness from [reporting victimization to police], the offense has been committed. [Citation.]" (*People v. Wahidi* (2013) 222 Cal.App.4th 802, 806.)

For these reasons, we conclude that the evidence is sufficient to sustain defendant's convictions of dissuading Pham and Dinh from reporting defendant's crimes against them.

B. *Admission of Expert Testimony on Rohypnol*

Defendant contends that the trial court erred when it admitted expert testimony on Rohypnol. Defendant argues that the court abused its discretion in admitting the evidence because the prosecution did not establish the foundation necessary for its admissibility—i.e., that one or more of the victims had suffered symptoms that could have been caused by the drug. Defendant also asserts that the testimony violated her right to due process and a fair trial under the Fourteenth Amendment because it undermined her defense, and that she was prejudiced by the error.

1. Trial Court Proceedings

The prosecution called District Attorney Investigator Todd Phillips to testify regarding Rohypnol. Investigator Phillips stated that he was a Sheriff's Deputy in Santa Cruz County from 1997 until July 2008, when he became a criminal investigator for the Santa Clara County District Attorney's Office. Investigator Phillips testified that he had received training at the police academy on controlled substances and also became familiar with controlled substances during his three months of field training. He later

took "advanced drug training" and spent about six weeks exclusively working drug crimes. Some of the courses Investigator Phillips attended included information on Rohypnol. Investigator Phillips also learned about the effects of Rohypnol through his work on sexual assault cases.

Investigator Phillips had spoken to people who believed they may have been given Rohypnol. He had also researched the drug for his "Parent Project" class, which he taught for parents of at-risk teenagers. Rohypnol is one of the drugs Investigator Phillips taught parents about "because it's a drug used to get sex." In addition, Investigator Phillips stated that he did some research on Rohypnol the morning of his testimony.

Investigator Phillips testified that Rohypnol is a central nervous system depressant and was designed to be a sleeping pill. It causes drowsiness and lowers inhibitions. Investigator Phillips explained, "So if you're maybe uncomfortable with a situation, if you were to take this drug, you would feel probably less bothered by what's happening around you, just generally kind of numbed to it." It also causes short-term amnesia. Among other things, Rohypnol is "known as . . . [the] forget me pill. It's wi[dely] recognized as a date rape drug . . . ." According to Investigator Phillips, Rohypnol "was white and should be tasteless . . . ." "It was a white pill that has been altered now" by the manufacturer so that it is "colored . . . when it's put in a drink . . . ." People start to feel its effects 15 to 30 minutes after ingestion. The effects last approximately 8 to 12 hours. The drug stays in a person's system for 60 to 72 hours and then is undetectable.

Defendant objected several times for lack of foundation during Investigator Phillips's testimony.[6] After the first objection on that basis, which occurred when the prosecutor asked why Rohypnol was referred to as the " 'forget me drug,' " the trial court told the prosecutor to "[l]ay a further foundation." The prosecutor did so by inquiring

[6] Defendant's attorney did not specify the particular basis for her lack-of-foundation objections, stating only, "Objection. Lack of foundation," or "Objection. Foundation."

specifically about Investigator Phillips's training on and experience with Rohypnol. He then asked Investigator Phillips about Rohypnol's effects, and defendant again objected for lack of foundation. The trial court held an unreported sidebar conference with the attorneys, and then asked the prosecutor to restate the question and allowed Investigator Phillips to answer. Defendant objected for a third time based on lack of foundation when the prosecutor asked Investigator Phillips to confirm that there was no toxicology test that could determine whether a person had been given Rohypnol 72 hours or more after the drug had been ingested and Investigator Phillips answered, "Correct." The trial court overruled the objection before holding another sidebar.

After Investigator Phillips testified, the trial court put the sidebar conferences on the record. The court stated, "We had a discussion at sidebar about whether or not [Investigator Phillips] had sufficient expertise to talk about Roh[y]pnol and its effects. And I initially sustained the objection. A further foundation was laid, and . . . I believe the standard was met, based on the training and experience the officer received in the academy, and also in classes he took in drug courses where Roh[y]pnol was mentioned, but more particularly, in conducting sexual assault [investigations], and also in the reading that he's done to be a lecturer for the parent project and also his recent internet research. All of those gives him a greater knowledge of Roh[y]pnol and its effects than a lay person. [¶] And the jury can consider his testimony for whatever value they want to give [it]. When we discussed the issue about the officer's limited experience with Roh[y]pnol, I did indicate that I would not permit him to discuss what sexual assault victims have told him about its effects . . . ." The court also noted that it did not allow testimony regarding people's descriptions of having "out-of-body experiences," but it did permit testimony regarding the unavailability of a test to determine whether someone had been given Rohypnol more than 72 hours after the drug had been ingested. The court concluded, "I think that as part of an officer's training and experience concerning drugs, he can have training and experience on how long those drugs can be detected. Again, I

don't think the officer has as much experience as some other expert might have in the area, but I think compared to an average juror, he's qualified to give the opinions that he gave." The court asked whether there was anything else the parties wished to put on the record, and both parties responded, "No. Thank you."

In closing argument, the prosecutor suggested to the jury that defendant may have drugged Dao, Dinh, Hoang, and Yamauchi based on their testimony that they did not feel like themselves around her. The prosecutor also stated that "defendant is not charged with having drugged anyone, okay. So you don't have to decide beyond a reasonable doubt whether that happened. What you can do is listen to the testimony of the people who think they may have been drugged . . . ." Later, the prosecutor mentioned Rohypnol when discussing Dao's testimony "that she may have been drugged." The prosecutor stated that he could not "tell [the jury] for sure what it was, but things like that are out there" and that Rohypnol "[t]aken in small doses can cause short-term memory loss." The prosecutor argued, "Julie Dao talked about [being] offered water in the defendant's white Lexus in the front seat. And that the water bottle . . . was partially opened at the time she drank it. [Investigator] Fong went out and located the car approximately a month after this incident, looked in the window and saw empty water bottles in the car . . . . [¶] [W]hether she [was] drugged or not is not an offense [with] which [the defendant has] been charged. You don't need to decide[] beyond a reasonable doubt whether or not she was actually drugged. What it does do is allow you the proper lens to put on when examining Julie Dao's story."

2. Analysis

Defendant contends that there was "no reasonable basis" for admitting Investigator Phillips's testimony because "[t]he testimony of the [complaining] witnesses did not provide a factual basis for concluding that they had ingested Rohypnol." Defendant argues that the evidence and the prosecutor's closing argument on Rohypnol "invited rank speculation that [defendant] had drugged and hypnotized the complaining witnesses

without providing a factual basis for such a conclusion." Defendant relies on Evidence Code sections 403, subdivision (a)(1), 801, and 802.[7]

a. *Evidence Code Sections 801 and 802*

Evidence Code sections 801 and 802 pertain to the admissibility of expert opinion testimony.[8] In *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon Enterprises*), the California Supreme Court stated that "under Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or 3) speculative." (*Id.* at pp. 771-772.) "Evidence Code section 801 governs judicial review of the *type* of matter; Evidence Code section 802 governs judicial review of the *reasons* for the opinion." (*Id.* at p. 771.)

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[7] The Attorney General does not contend that defendant forfeited this claim by failing to object to Investigator Phillips's testimony on the basis of Evidence Code sections 403, 801, or 802. Thus, we do not address whether the claim was properly preserved.

[8] Evidence Code section 801 provides: "If a witness is testifying as an expert, his [or her] testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his [or her] special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him [or her] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his [or her] testimony relates, unless an expert is precluded by law from using such matter as a basis for his [or her] opinion."

Evidence Code section 802 states: "A witness testifying in the form of an opinion may state on direct examination the reasons for his [or her] opinion and the matter (including, in the case of an expert, his [or her] special knowledge, skill, experience, training, and education) upon which it is based, unless he [or she] is precluded by law from using such reasons or matter as a basis for his [or her] opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his [or her] opinion is based."

The court explained that "[t]he goal of trial court gatekeeping is simply to exclude 'clearly invalid and unreliable' expert opinion." (*Sargon Enterprises, supra*, 55 Cal.4th at p. 772.) " '[U]nder existing law, irrelevant or speculative matters are not a proper basis for an expert's opinion.' [Citation.]" (*Id.* at p. 770.) Rather, " 'the matter relied on must provide a reasonable basis for the particular opinion offered, and . . . an expert opinion based on speculation or conjecture is inadmissible.' " (*Ibid.*) "The trial court's preliminary determination whether the expert opinion is founded on sound logic is not a decision on its persuasiveness. The court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. . . . [The court] conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.' [Citation.]" (*Id.* at p. 772.)

For example, in *People v. Richardson* (2008) 43 Cal.4th 959, 1008-1009, fn. omitted, the California Supreme Court upheld the trial court's exclusion of expert opinion testimony proffered by the defense because in rendering his opinion, the expert would have relied on "estimates, not measurements," and "there were a number of variables that could have affected the [opinion] as to which there was no evidence at all . . . . Given these uncertainties, [the Supreme Court could not] say the trial court abused its discretion in excluding [the expert's] testimony."

Here, Investigator Phillips testified to Rohypnol's effects and its detectability, but he did not answer any hypothetical questions or render any opinions on whether any of the victims may or may not have ingested the drug. Moreover, Investigator Phillips's testimony was based on his training and experience, upon which he could reasonably rely. "In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though that information

may have been derived from conversations with others, lectures, study of learned treatises, etc." (*People v. Sanchez* (2016) 63 Cal.4th 665, 675.) Thus, we conclude that the admission of Investigator Phillips's testimony did not run afoul of Evidence Code sections 801 and 802.

b. *Evidence Code Section 403, Subdivision (a)(1)*

Evidence Code section 403, subdivision (a)(1) pertains to foundational and preliminary facts.[9] "When the relevance of proffered evidence depends on the existence of a preliminary fact, the proponent of the evidence has the burden of producing evidence as to the existence of that preliminary fact. (Evid. Code, § 403, subd. (a)(1).) The proffered evidence is inadmissible unless the trial court finds sufficient evidence to sustain a finding of the existence of the preliminary fact. [Citations.]" (*People v. Bacon* (2010) 50 Cal.4th 1082, 1102-1103 (*Bacon*).) A "court should exclude the proffered evidence only if the 'showing of preliminary facts is too weak to support a favorable determination by the jury.' [Citations.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 466.)

" 'The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion.' [Citations.]" (*Bacon*, *supra*, 50 Cal.4th at p. 1103.) "Such determinations will not be disturbed on appeal unless an abuse of discretion is shown." (*People v. Brooks* (2017) 3 Cal.5th 1, 47 (*Brooks*).)

Defendant contends that "the foundational evidence necessary to establish the admissibility of Phillips' expert testimony was evidence that one or more of the complaining witnesses had, in fact, suffered symptoms that could be caused by Rohypnol" and that such foundational testimony was absent here. However, it is

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[9] Section 403, subdivision (a)(1) states: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when . . . [¶] . . . [t]he relevance of the proffered evidence depends on the existence of the preliminary fact."

apparent from the trial court's summary of the sidebar conferences that the foundational issue raised by defendant was the investigator's qualifications to testify on the effects and detectability of Rohypnol, not whether there was sufficient evidence of a preliminary fact to render the testimony relevant. The court stated that it had discussed with the parties "whether or not [Investigator Phillips] had sufficient expertise to talk about Roh[y]pnol and its effects." After the court gave the reasons for its ruling, both parties declined the court's invitation to add "anything else."

Since the trial court was not asked to exercise its discretion under Evidence Code section 403, "it could not have abused its discretion as defendant claims." (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 128; accord, *Agricultural Labor Relations Bd. v. Laflin & Laflin* (1979) 89 Cal.App.3d 651, 666, fn. 16 ["It would be both inappropriate and futile for us to attempt to review for abuse a discretion the court was never requested to exercise and did not purport to exercise"]; *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1149 [where a party failed to ask the trial court to exercise its discretion, the party could not complain on appeal that the trial court's decision was erroneous].)

Moreover, even if we were to assume error here, we would determine that the admission of Investigator Phillips's testimony was harmless because there is no reasonable probability defendant would have obtained a more favorable result absent its admission. (See *Brooks, supra*, 3 Cal.5th at pp. 47-48 [applying the state-law prejudice standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 to an assumed error under Evid. Code, § 403, subd. (a)(1)].)

Although we have found insufficient evidence to sustain the allegation that a nonaccomplice was present when defendant burglarized Bui and to sustain two of defendant's convictions of passing an altered or fictious check, the evidence against defendant on the remaining counts and allegations was strong. Defendant contends that the expert testimony on Rohypnol undermined her defense that the victims were really

her accomplices because it explained some of the victims' puzzling conduct, but she overlooks that in addition to the victims' testimony, the jury was presented with documentary evidence of defendant's crimes. For example, the prosecution moved into evidence Hoang's, Yamauchi's, Ho's, Dao's, and Dinh's bank records, which showed that the large cash withdrawals from their accounts began after defendant responded to the ads they placed in Thang Mo Magazine regarding the rooms for rent. The letters defendant wrote to Pham and Dinh from jail were also admitted into evidence, and in them defendant apologized for her actions and promised to repay them. Also in evidence was the check Dao and Hien found in defendant's cell phone case belonging to Dao. The check was written for $7,800 and signed in Dao's name but the payee was blank. Moreover, defendant's accomplice defense could not explain Bui's testimony that a Cartier watch and a diamond ring went missing from his house after he showed the items to defendant and the diamond appraisal certificate that was located in defendant's room at Dao's house.

For these reasons, even if we were to conclude that the trial court abused its discretion in admitting Phillips's testimony regarding the effects and detectability of Rohypnol, we would find the error was harmless.

c. *Fourteenth Amendment Claim*

Defendant also contends that the admission of Investigator Phillips's testimony on Rohypnol violated her Fourteenth Amendment right to due process and a fair trial. However, "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

For reasons similar to those that rendered the assumed error harmless, we would conclude that the admission of Investigator Phillips's testimony, if error, did not result in a fundamentally unfair trial. As we stated above, the evidence of defendant's guilt was strong, as it included not just the testimony of eight victims regarding defendant's

substantially similar wrongdoing, but documentary evidence corroborating the victims' testimony. Significantly, the prosecution's case against defendant "was based primarily on evidence *other* than" the Rohypnol evidence, and none of the Rohypnol evidence was "so 'uniquely inflammatory' as to render the trial fundamentally unfair. [Citation.]" (*People v. Covarrubias* (2011) 202 Cal.App.4th 1, 20-21, fn. omitted.)

In sum, defendant has not established that the trial court abused its discretion when it admitted evidence on the effects and detectability of Rohypnol. Even if we were to assume that the admission of the evidence was error, however, we would conclude that it was harmless and did not violate defendant's right to due process and a fair trial.

C. *Restitution*

Defendant's next claim pertains to the victim restitution award. Defendant contends that the trial court erred when it determined the restitution owed because it "imposed restitution for acts not resulting in conviction" in violation of section 1202.4, subdivision (a)(1), which states that "a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime."[10] Defendant premises her claim solely on the grand theft by trick convictions (counts 9-11 and 13-15)[11] and asserts that "[b]ecause only on[e] theft was charged as to each complaining witness, [she] was convicted of a *single taking* per complaining witness." (Italics added.) Defendant contends that under section 1202.4, she could therefore only be lawfully ordered to pay restitution in the amount of a single taking from each victim and that since there were multiple acts that could have been the

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[10] Defendant primarily relies on *People v. Martinez* (2017) 2 Cal.5th 1093, 1101, *People v. Woods* (2008) 161 Cal.App.4th 1045, 1049, *People v. Lai* (2006) 138 Cal.App.4th 1227, 1247, and *People v. Percelle* (2005) 126 Cal.App.4th 164, 179-180, in light of the trial court's unanimity instruction on counts 9 through 11 and 13 through 15.

[11] Neither party addresses whether restitution was owed on the burglary convictions (counts 1-6).

basis of each of the convictions, the trial court was obligated to award restitution in the amount of the smallest taking that qualified as grand theft from each victim.

Because we must remand the matter for resentencing, defendant may raise this claim before the trial court on remand.

D. *Prior Serious Felony Conviction Enhancement*

The trial court imposed a consecutive five-year term under section 667, subdivision (a), as was statutorily required when defendant was sentenced. (Former §§ 667, subd. (a)(1), amend. approved by voters, Prop. 36, § 2, eff. Nov. 7, 2012; § 1385, subd. (b), added by Stats. 2014, ch. 137, § 1.) "On September 30, 2018, the Governor signed Senate Bill [No.] 1393 which, effective January 1, 2019, amend[ed] sections 667(a) and 1385(b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)" (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) Defendant contends remand is required to permit the trial court to exercise its discretion to strike her prior serious felony conviction. The Attorney General agrees.

Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), "[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted.) "The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses." (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.) Because nothing in Senate Bill No. 1393 suggests a legislative intent that the amendments to sections 667, subdivision (a), and 1385, subdivision (b), apply prospectively only, "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill [No.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill [No.] 1393

becomes effective on January 1, 2019." (*Garcia*, *supra*, 28 Cal.App.5th at p. 973.) Defendant's case was not final on January 1, 2019. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306 [" 'a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. [Citations.]' "].)

" 'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.]' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) When the record shows that the trial court proceeded with sentencing on the assumption that it lacked discretion, remand for resentencing is necessary "unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' [Citations.]" (*Ibid.*)

The record before us does not clearly indicate that the trial court would have declined to strike defendant's prior serious felony conviction if it had the discretion to do so for the purposes of sentencing her under section 667, subdivision (a). (Cf. *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand for resentencing because "the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence"].) Accordingly, we agree with the parties that remand is appropriate to allow the trial court to exercise its discretion regarding whether to strike defendant's prior serious felony conviction for sentencing purposes.

E. *Dueñas Error*

Lastly, relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), defendant contends that the trial court improperly imposed various fines and fees without determining whether defendant had the financial ability to pay them.[12] The Attorney

[12] Defendant challenges the trial court's imposition of a $10,000 restitution fine, a $360 court security fee, a $275 criminal conviction assessment, a $259.50 criminal justice administrative fee, and a $10 fine pursuant to section 1202.5 for defendant's commission of burglary.

General counters that defendant has forfeited her *Dueñas* claim by failing to object to the fines and fees at sentencing; *Dueñas* was wrongly decided; and any error was harmless.

Because we must remand the matter for resentencing, defendant may raise this claim before the trial court on remand.

IV. DISPOSITION

The judgment is reversed and the matter is remanded for resentencing. The trial court shall vacate the jury's Penal Code section 667.5, subdivision (c)(21) finding on count 4 and the convictions of Penal Code section 476 on counts 17 and 18 and resentence defendant. The trial court shall also determine whether to exercise its discretion pursuant to Penal Code section 1385 to strike defendant's prior serious felony conviction for the purposes of sentencing her under Penal Code section 667, subdivision (a). Defendant may raise the restitution and the *People v. Dueñas* (2019) 30 Cal.App.5th 1157 issues in the trial court on remand.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

GREENWOOD, P.J.

DANNER, J.

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